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No. 31

In the Supreme Court of the United States

OCTOBER TERM, 1929

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, Petitioner

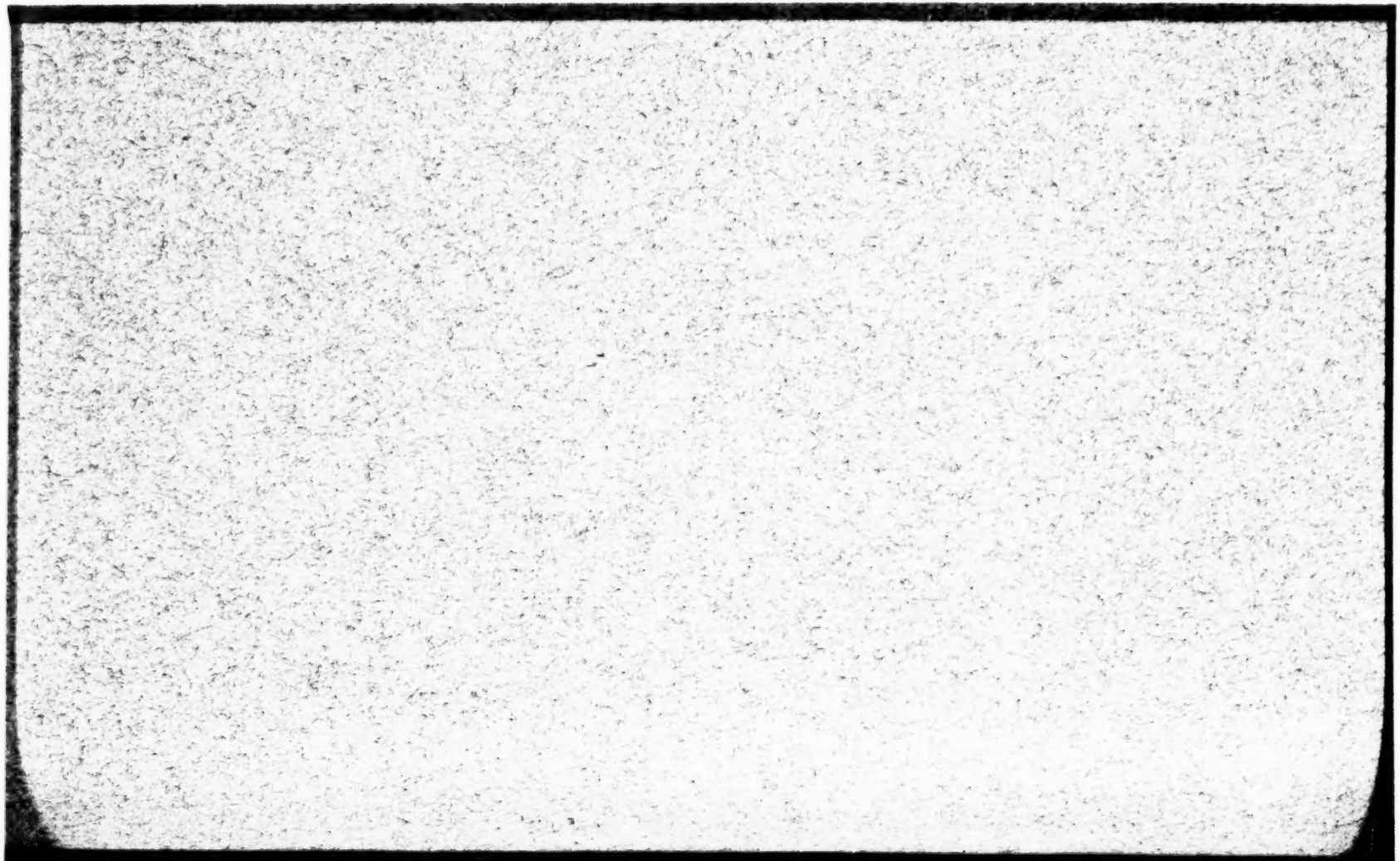
v.

SANFORD & BROOKS COMPANY

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

King Bros., Inc., Printers, 208 N. Calvert St., Baltimore, Md.

CHARLES McH. HOWARD,



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OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals (R. 30-36) is reported in 35 F. (2d) 312. The opinion of the United States Board of Tax Appeals (R. 11-21) is reported in 11 B. T. A. 452.

STATEMENT OF FACTS

The Respondent, as agent for the Atlantic Dredging Company, under a contract with the United States Government, was engaged in dredging a part of the Delaware River during the years 1913, 1914, 1915 and 1916: it expended, in those years, in doing the work, a total of $176,271.88 in excess of the payments re-

ceived for the same, the amount of said excess, allocated to those years (1913 to 1916) on the basis of excess of expenditures made over payments received in each year, being as follows:

1913	$28,241.03
1914	68,117.81
1915	69,705.15
1916	10,207.89
Total	$176,271.88

These amounts constituted losses, that is to say, the expenditures by the Respondent made incident to the performance of the work exceeded the amount paid for doing the work. Until 1916, the Respondent assumed that the losses which it had made in performing the work aforesaid, had been sustained because of its having taken an unprofitable contract. In 1916, however, it learned that certain representations which had been made on behalf of the Federal Government, on the strength of which the contract was accepted, had been misleading: it promptly discontinued the work and instituted suit in the Court of Claims against the United States, to recover the amount of the loss so sustained by it in the performance of the contract, as well as damages.

The Court of Claims found that the expenditures made in the performance of the contract had amounted to $211,050.00 more than the Respondent had received in payment for the work, which amount the Court allowed to the Claimant (Atlantic Dredging Co. vs. United States, 53 C. Cls. 490 [R. 13]): on appeal to this Court, the judgment of the Court of Claims was affirmed (United States vs. Atlantic Dredging Co., 253 U. S. 1 [R. 13]) and there was accordingly paid to the

Taxpayer in 1920, the amount of the judgment rendered in its favor, with interest thereon amounting to $16,305.71, a total paid of $227,355.80. The Atlantic Dredging Company was entitled and there was paid to it $34,778.21, making the net amount received by the taxpayer $192,577.59 (R. 13).

The interest allowed, $16,305.71, was clearly taxable income for the year 1920 in which year it was received and it was reported as such; deducting this sum from the amount received by the taxpayer as aforesaid, left a balance of $176,271.88 which it received.

This amount the Respondent did not include in its return for 1920, but after the receipt of the same, it filed its amended returns for the years 1913, 1914, 1915 and 1916 to give effect to the reimbursement (R. 14, 6, 4).

The Commissioner of Internal Revenue held that the entire sum received by the Respondent, $192,577.59 and which was paid to it pursuant to the judgment, was income for 1920 (R. 12). The Respondent took an appeal to the Board of Tax Appeals which upheld the finding of the Commissioner (R. 21-22); it then appealed to the Circuit Court of Appeals for the Fourth Circuit (R. 22), which reversed the decision of the Board of Tax Appeals, holding that the amount of the judgment, exclusive of interest, which interest the Taxpayer had accounted for as income for 1920, did not constitute taxable income and remanded the case with directions that upon the filing of amended returns for the years 1913 to 1916, eliminating the deductions therein claimed on account of the loss which had been reimbursed, the amount received in reimbursement should be eliminated from the computation of income of the Respondent for the year 1920; the

decision held further that the item of interest $16,305.71 should be included in the computation of income for the year 1920; this had already been done by the Respondent in its return for that year (R. 30-34).

QUESTIONS PRESENTED

The Petitioner avers—

(a) that the Circuit Court of Appeals erred in holding that the amount of the judgment, exclusive of interest, received by the Respondent in 1920, should be excluded from the Taxpayer's gross income for that year, and

(b) that said Court likewise erred in directing that the decision of the Board of Tax Appeals holding the amount of the judgment received to be income for the year 1920, should be reversed provided the Respondent amends its returns for the years 1913 to 1916, and eliminates the deductions therein claimed on account of the loss which it had sustained and for which it was reimbursed by the payment of the judgment, the Petitioner contending that by so doing, the Court decided questions directly affecting tax liability for those years and that on the record it had no power so to do.

The last two errors are specified separately in the petition.

The Petitioner assigns as reasons for granting the writ, the following:

1st. that the Circuit Court of Appeals "has apparently laid down the principle that the term 'gross income' as used in the revenue laws relates only to profits" and this, Petitioner asserts is error;

2nd. that as the record is silent as to whether the Taxpayer for the year 1920, reported on a cash basis or on an accrual basis, the Commissioner's action in determining the amount of the judgment to be taxable income for 1920 was *prima facie* correct and should have been approved.

This contention assumes, of course, that the amount received was taxable income in some year, although it was held by the Circuit Court of Appeals to be non-taxable income for any year; and

3rd. that no one of the years 1913 to 1916 was involved in the appeal of the Respondent to the United States Board of Tax Appeals or in the Board's redetermination of the finding of the Commissioner and that the Circuit Court of Appeals, therefore, had no authority to "consider and decide questions affecting" the years 1913 to 1916, inclusive.

STATUTE INVOLVED

Revenue Act of 1918, Section 213, as follows:

"The term 'gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

The definition above quoted is substantially the same and identically the same for the purposes of the

petition and this answer, as that contained in the Acts of 1913, 1916 and 1917 [Revenue Act of 1913, Section B; Revenue Act of 1916, Section 2A(d), and Revenue Act of 1917, Section 1201(1)].

ARGUMENT

The Circuit Court of Appeals did not expressly or impliedly assert that gross income as used in the Revenue Law related only to profits and the Petitioner is in error in so stating. The finding of the Court was that as "income, even gross income, within the meaning of the taxing acts, is not synonymous with receipts", and as the amount of the judgment paid under the decision of this Court was "simply compensatory of the cost of the work of which the Government got the benefit" that the amount received under the judgment was "in reimbursement of loss" and that that being the case, the amount of it did not represent a gain derived from capital, labor, or from any other source and, therefore, was not taxable (R. 30-31).

Quoting the decision of this Court in Eisner vs. Macomber, 252 U. S. 189, the Circuit Court of Appeals simply held that the amount in question "was not gain derived from capital, from labor, or from both combined". Manifestly, this is correct; the petitioner was no better off financially after receiving the money than it was before it had made the payments which were reimbursed to it by the payment of the judgment.

What has been said applies as well to the second as to the first ground assigned by the Petitioner for the granting of the writ.

As a third reason for the request for the writ, the Petitioner asserts that as none of the years 1913 to 1916 were involved in the appeal to the Board of Tax Appeals, the Circuit Court of Appeals had not authority to consider and decide questions affecting the years 1913 to 1916, inclusive. In the "Findings Of Fact" of the Board of Tax Appeals (R. 14), the Board found that the Respondent had filed amended returns asking that the amount of the judgment be treated as income for the years 1913 to 1916, inclusive; it did not make a determination of tax liability with respect to those years it is true, but found the entire amount of the judgment to be income for the year 1920 and taxable as such. Neither can the decision of the Circuit Court of Appeals be construed as a redetermination of the taxes for those years. The decision is simply that the taxpayer could not get the benefit of the saving in taxes resulting from the loss sustained in 1913 to 1916, inclusive and yet retain the amount paid it in reimbursement of the loss or be permitted to retain the amount paid to it and yet get the benefit through a saving of taxes for the years 1913-1916, of the failure of the Government to pay the obligation.

CONCLUSION

We submit that the instant case involves no special or important reason for the granting of the writ prayed for and that the petition should be denied.

HARRY N. BAETJER,
Attorney for Respondent.

CHARLES McH. HOWARD,

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BRIEF FOR THE RESPONDENT.